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Respecting Your Elders: The “Highly Marketable” Skills Standard for Social Security Disability Claimants over Age Sixty

*Kerns v. Apfel*¹

I. INTRODUCTION

As individuals age, they may face barriers to obtaining employment that did not exist for them when they were younger. Age thus may become a factor in any assessment of the likelihood that persons will successfully find new work. For Social Security disability benefits claimants under age fifty, age is generally not considered to present an obstacle to adjusting to new employment contexts. However, for claimants over age fifty, age is acknowledged as a factor that may significantly impact their ability to adjust to new work.

For workers over age sixty, age has been deemed by the Social Security Administration (“SSA”) to be a barrier not only to their ability to *do* work, but also to their ability to *get* work.² Both the statute and the regulations addressing the disbursement of Social Security disability benefits contain specific language indicating that a claimant’s ability to obtain work is not a factor in determining the existence of a disability.³ Nonetheless, every circuit considering the issue has interpreted the regulations as requiring a finding that claimants over age sixty possess skills that will enable them to *obtain* work before they can be found to have “transferable” skills.

In *Kerns v. Apfel*,⁴ a case of first impression, the Eighth Circuit allied itself with the other circuits that have considered the issue of what must be shown to

1. 160 F.3d 464 (8th Cir. 1998).

2. See Larry M. Gropman, *Social Security*, 1995 DET. C.L. REV. 773, 782 (1995) (explaining that “advancing age becomes an increasingly impenetrable barrier to obtaining employment”); *infra* note 3.

3. See *Tom v. Heckler*, 779 F.2d 1250, 1257 n.11 (7th Cir. 1985) (recognizing that the statute contemplates age as a vocational factor which affects a person’s ability to perform and not to obtain work). The regulations state: “‘Age’ refers to how old you are (your chronological age) and the extent to which your age affects your ability to adapt to a new work situation and *to do work* in competition with others.” 20 C.F.R. § 404.1563(a) (1998) (emphasis added). The statute provides:

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, *or whether he would be hired if he applied for work.*

42 U.S.C. § 423 (d)(2)(A) (1994) (emphasis added).

4. 160 F.3d 464 (8th Cir. 1998).

deny Social Security disability benefits to claimants over age sixty. In order to deny benefits to these claimants, an inquiry into an individual claimant's ability to obtain employment is required; a showing that the claimant is able to perform a specific type of employment is insufficient. This Note explores the lack of an explicit statutory dictate upon which the *Kerns* court relied, and the wisdom of allocating Social Security entitlements to those capable of working.⁵

II. FACTS AND HOLDING

On February 1, 1994, Danny C. Kerns ("Kerns") applied for disability benefits under the Social Security Act.⁶ Kerns claimed that he was suffering from Paget's disease of the hip.⁷ Kerns's application was denied, and upon reconsideration was denied again.⁸ He appealed the denial to an Administrative Law Judge ("ALJ"), who conducted a hearing in November 1995.⁹ At the hearing, Kerns testified that his Paget's disease prevented him from working because it caused him constant pain, disturbed his sleep, impaired his ability to concentrate, and prohibited him from standing or sitting for extended periods of time.¹⁰

Kerns further testified that when he incurred his disability he worked at a funeral home where his responsibilities included conducting funerals, lifting caskets, and handling bookkeeping and accounting chores.¹¹ He testified that he had a high school education and two years of college, but that his sole academic training in bookkeeping was from a high school class in accounting.¹² A vocational expert testified that Kerns's accounting skills were transferable to approximately 14,480 similar positions in Missouri without significant vocational adjustment by Kerns.¹³

5. See Jonathan Barry Forman, *Symposium: Living Longer: A Legal Response to Aging in America; Reforming Social Security to Encourage the Elderly to Work*, 9 STAN. L. & POL'Y REV. 289, 292 (1998) ("The most pressing problem is that Social Security is in financial trouble, and quite simply, will not be able to meet its future benefit commitments. Furthermore, the current Social Security system often unfairly discourages the elderly from working."); see *infra* Part V.

6. *Kerns v. Apfel*, 160 F.3d 464, 465 (8th Cir. 1998).

7. *Id.* (defining Paget's disease as a "generalized skeletal disease, frequently familial, of older persons in which bone resorption and formation are both increased, leading to thickening and softening of bones . . . and bending of weight-bearing bones") (quoting STEDMAN'S MEDICAL DICTIONARY 501 (26th ed. 1995)).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* 20 C.F.R. § 404.1520(f)(1) (1998) requires, *inter alia*, that the claimant's education be considered in determining whether his or her skills are transferable.

13. *Id.* There were 4,400 positions similar to Kerns's prior position in the Kansas City area where Kerns lived. *Id.*

The ALJ did not consider Kerns's complaints of pain credible in the absence of supporting medical evidence, and in light of Kerns's testimony that his daily activities included swimming and performing household chores.¹⁴ The ALJ determined that Kerns was not suffering from a disability and denied him Social Security benefits.¹⁵

Kerns appealed the ALJ's determination to an Administrative Appeals Council, which found that Kerns had "the residual functional capacity for sedentary work," and that he had transferable skills.¹⁶ In determining the transferability of Kerns's skills, the Appeals Council relied on a finding that Kerns would need "no significant vocational adjustment" to function as a bookkeeper.¹⁷ The Appeals Council did not consider whether Kerns's skills were "highly marketable," and, after finding that his skills were transferable, the Appeals Council found that Kerns was not disabled."¹⁸ The Appeals Council denied benefits to Kerns.¹⁹

In 1997, Kerns sought judicial review of the Appeals Council's decision in the United States District Court for the Western District of Missouri.²⁰ In an unpublished decision, the district court found substantial evidence on the record as a whole to support the Appeals Council's decision and affirmed the denial of benefits to Kerns.²¹ In reaching its decision, the district court did not consider the transferability or marketability of Kerns's accounting skills.²²

In 1998, Kerns appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit.²³ In a case of first impression, the court found that the Appeals Council did not apply the appropriate legal standard under the Social Security Act regulations, which impose a "progressively more stringent burden" on the Appeals Council before disability benefits can be denied as claimants get older.²⁴ Kerns was sixty-one years old at the time of his hearing before the ALJ.²⁵ Under the regulations, claimants who are between sixty and sixty-four years old, and who have a severe impairment, are not considered able to adjust to sedentary work unless their skills are "highly marketable."²⁶

14. *Id.*; see *supra* note 3.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* (citing 20 C.F.R. pt. 404, subpt. P, app. 2, tbl. I).

19. *Id.*

20. *Id.* at 465 & n.5.

21. *Id.* at 465-66.

22. *Id.* at 466.

23. *Id.*

24. *Id.* (citing 20 C.F.R. § 404.1563 (1998)).

25. *Id.* at 467.

26. *Id.* (quoting 20 C.F.R. § 404.1563(d) (1998)).

The court determined that “highly marketable” is not the same as “transferable,” and that “highly marketable” imposes a higher burden on the Appeals Council in considering a claimant’s appeal.²⁷ The court held that because neither the ALJ nor the Appeals Council considered the marketability of Kerns’s skills, the decision to deny disability benefits was not supported by substantial evidence on the record as a whole.²⁸ The court vacated the judgment of the district court and remanded to the Appeals Council for further consideration of Kerns’s claim in light of the proper legal standard.²⁹

III. LEGAL BACKGROUND

Shortly after the Depression of the late 1920s and early 1930s, when the Nation’s unemployment rate peaked at over twenty-five percent, Americans looked to the federal government to take a more active role in protecting them from economic catastrophe.³⁰ After President Franklin Roosevelt took office in 1932, he offered a “New Deal” to Americans.³¹ In this New Deal, Roosevelt recommended that a social insurance safety net for the elderly be created, and his recommendation ultimately was manifested in the Social Security Act of 1935.³² Congress intended that Social Security function as earned assistance, not a handout.³³

Social Security benefits are provided to workers under the age of sixty-five who have become disabled.³⁴ Disability is defined in the statute in terms of an individual’s ability “to engage in any substantial gainful activity.”³⁵ The initial

27. *Id.* at 468.

28. *Id.* at 469.

29. *Id.*

30. See William G. Dauster, *Protecting Social Security and Medicare*, 33 HARV. J. ON LEGIS. 462, 462 (1996).

31. *Id.*

32. *Id.* The Act is codified at 42 U.S.C. §§ 301-1397(e) (1994). Section 301 of the statute provides in pertinent part:

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish financial assistance to aged needy individuals, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted . . . State plans for old-age assistance.

42 U.S.C. § 301 (1994).

33. See Dauster, *supra* note 30, at 463 (“Congress created both Social Security and Medicare as social insurance programs. Congress intended that they operate as earned benefits, not as welfare.”).

34. See Forman, *supra* note 5, at 289.

35. 42 U.S.C. § 423(d)(1)(A) (1994). The statute defines “disability” as an: [I]nability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected

burden to establish the existence of a disability is on the claimant who must show that she is not currently working, that her impairment is severe, and that she is unable to perform her prior work.³⁶ This showing is part of a five-step analysis required by the regulations promulgated pursuant to the Social Security Act. If the claimant proves the first four elements, the burden shifts to the Commissioner to show that the claimant is able to perform other jobs.³⁷ This part of the analysis is concerned with the "marketability" of the claimant's employment skills.

On August 20, 1980, a regulation requiring a heightened assessment of the impact age has on a Social Security disability benefits claimant's employment prospects was added to the Social Security Act regulations.³⁸ Under the regulation, age generally will not be a factor for claimants under age fifty.³⁹ For claimants between fifty and fifty-four years old, age, coupled with a severe impairment and narrow employment experience, becomes a factor in determining the transferability of the claimant's skills for purposes of a finding of disability.⁴⁰ For claimants fifty-five years old and over, age is considered to significantly affect ability to work.⁴¹ A claimant between sixty and sixty-four years old, who has a severe impairment, must be found to have "highly marketable" skills before she can be considered to have skills that are transferable to light or sedentary work.⁴²

to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months

42 U.S.C. § 423(d)(1)(A) (1994).

36. See *Kerns v. Apfel*, 160 F.3d 464, 466 n.6 (8th Cir. 1998) (citing *Fines v. Apfel*, 149 F.3d 893, 894 (8th Cir. 1998); 20 C.F.R. § 404.1520 (1998)).

37. See *Fines*, 149 F.3d at 895.

38. *Tom v. Heckler*, 779 F.2d 1250, 1256 (7th Cir. 1985) (Posner, J., dissenting) (citing 20 C.F.R. § 404.1563(d) (1985)).

39. 20 C.F.R. § 404.1563(b) (1999). The provision reads in part: "Younger person. If you are under age 50, we generally do not consider that your age will seriously affect your ability to adapt to a new work situation." *Id.*

40. 20 C.F.R. § 404.1563(c) (1999). The provision reads: "Person approaching advanced age. If you are closely approaching advanced age (50-54), we will consider that your age, along with a severe impairment and limited work experience, may seriously affect your ability to adjust to a significant number of jobs in the national economy." 20 C.F.R. § 404.1563(c) (1999).

41. 20 C.F.R. § 404.1563(d) (1999).

42. 20 C.F.R. § 404.1563(d) (1999). The subsection reads:

Person of advanced age. We consider that advanced age (55 or over) is the point where age significantly affects a person's ability to do substantial gainful activity. If you are severely impaired and of advanced age and cannot do medium work (see § 404.1567 (c)), you may not be able to work unless you have skills that can be used in (transferred to) less demanding jobs which exist in significant numbers in the national economy. If you are close to retirement age (60-64) and have a severe impairment, we will not consider you able to adjust to sedentary or light work *unless you have skills which are*

In *Tom v. Heckler*,⁴³ the Seventh Circuit became the first federal circuit to consider the “highly marketable” skills standard in the context of an appeal from a district court decision affirming a denial of a claimant’s application for Social Security disability insurance benefits.⁴⁴ In *Tom*, the claimant, David Tom, was a sixty-two year old mechanical technician for Magnavox Corporation.⁴⁵ Tom had undergone surgery for the removal of a kidney stone after which he developed an incisional hematoma requiring drainage.⁴⁶ Tom complained of constant pain, loss of strength, muscle spasms, and high blood pressure.⁴⁷ After an initial and subsequent denial of his application by the SSA, Tom received a hearing before an ALJ.⁴⁸ The ALJ determined, based upon medical reports and tests, and the testimony of a vocational expert, that Tom was able to perform sedentary work.⁴⁹ The ALJ also found that Tom possessed skills that were transferable to other work with very little adjustment so that Tom was not disabled.⁵⁰ The court found that the ALJ failed to follow the new regulation in neglecting to consider the impact Tom’s age had on the transferability of his skills.⁵¹

After a strong statement that the language of the new regulation was “unmistakably clear,” the Seventh Circuit went on to hold that Social Security disability benefits claimants between sixty and sixty-four years old cannot be found to possess transferable skills unless they possess “highly marketable” skills.⁵² The court concluded that the ALJ did not consider whether Tom’s skills were “highly marketable” because the record was devoid of any mention of the “highly marketable” standard and any citation to the regulation.⁵³ The court reversed and remanded on the grounds that the record did not provide a basis for finding whether Tom’s skills were “highly marketable.”⁵⁴

highly marketable.

20 C.F.R. § 404.1563(d) (1999) (emphasis added).

43. 779 F.2d 1250 (7th Cir. 1985) (Posner, J., dissenting).

44. *Id.* at 1251.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 1252.

50. *Id.*

51. *Id.* at 1256.

52. *Id.*

53. *Id.* at 1257.

54. *Id.* It is interesting to note that the *Tom* court looked to the record to determine whether there was evidence of transferability. The *Kerns* court reviewed a record that showed there were over 4000 positions available in the claimant’s area that were similar to his prior work. Based on the reasoning in *Tom*, this evidence would seem to show that Kerns possessed “highly marketable” job skills. See *Kerns v. Apfel*, 160 F.3d 464, 465 (8th Cir. 1998). Also helpful on this point is the Sixth Circuit’s definition of “highly marketable” containing the assertion that “[a]lso probative is the relative abundance of

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In a footnote, after asserting that the determination of a claimant's skills as "highly marketable" should be left to the ALJ, the *Tom* court recognized that the regulations do not define the standard "highly marketable."⁵⁵ The court attempted to arrive at some definition by referring to the definition of "age" in the regulations.⁵⁶ The court acknowledged that the statutory definition of disability calls for an evaluation of vocational factors only insofar as they affect a claimant's ability to perform jobs, not to get jobs,⁵⁷ but the court further acknowledged that the SSA Secretary has recognized a connection between age and the probability of obtaining employment.⁵⁸

In *Varley v. Secretary of Health & Human Services*,⁵⁹ the Sixth Circuit, addressing the issue of the "highly marketable" skills standard, stated that "the regulation sets forth a straightforward command" that disability claimants between sixty and sixty-four years of age cannot be found to have transferable skills absent a finding that their skills are "highly marketable." The *Varley* court asserted that this "straightforward command" is "intuitively reasonable" in light of the recognition that older people have a more difficult time finding employment.⁶⁰

To date, no circuit court has held that the regulation does not require a consideration of older claimants' ability to *obtain* employment, even though the statute pursuant to which the regulation was promulgated specifically provides for evaluation of vocational factors in terms of the effect they have on the ability to *perform* work.⁶¹ In 1994, the Sixth Circuit arrived at a definition of "highly marketable" skills as those "acquired through specialized or extensive education, training or experience, and which make the claimant's age not a deterrent or even a consideration in the hiring process."⁶² Subsequently, the SSA adopted the Sixth Circuit's definition of "highly marketable."⁶³

jobs in the economy requiring the skills as compared to the relative scarcity of persons possessing the necessary skills." *Preslar v. Secretary of Health & Human Servs.*, 14 F.3d 1107, 1112 (6th Cir. 1994).

55. *Id.* at 1257 n.11.

56. *Id.* (quoting 20 C.F.R. § 404.1563(a) (1985)).

57. *Id.* (citing 42 U.S.C. § 423(d)(2) (1984)).

58. *Id.* (citing 43 Fed. Reg. 55353 (1978)).

59. 820 F.2d 777 (6th Cir. 1987).

60. *Id.* at 782.

61. 42 U.S.C. § 423(d)(2) (1994); *see supra* note 3 (quoting the relevant statutory text).

62. *Preslar v. Secretary of Health & Human Servs.*, 14 F.3d 1107, 1113 (6th Cir. 1994). The court reasoned that highly marketable skills are such that a claimant "enjoys a significant advantage or edge over others competing for employment. Also probative is the relative abundance of jobs in the economy requiring the skills as compared to the relative scarcity of persons possessing the necessary skills." *Id.* at 1112.

63. HARVEY C. MCCORMICK, *SOCIAL SECURITY CLAIMS AND PROCEDURES* (4th ed. 1991 & Supp. 1997).

In *Fines v. Apfel*,⁶⁴ the Eighth Circuit determined that a sixty year old claimant was not entitled to Social Security disability benefits because he had acquired transferable skills in his work as a truck driver. The majority in *Fines* did not discuss whether the claimant's skills were "highly marketable."⁶⁵ At the time of the ALJ's decision to deny benefits, the claimant was fifty-seven years old. The dissenting judge, Circuit Judge Heaney, asserted that the applicable legal standard was the "highly marketable" skills standard contained in the regulations.⁶⁶ Judge Heaney is supported by the Sixth Circuit in his contention that the a claimant's age at the time of the decision is dispositive.⁶⁷ Other than in the dissenting opinion in *Fines*, the "highly marketable" skills standard had not been addressed by the Eighth Circuit until *Kerns v. Apfel*.⁶⁸

IV. INSTANT DECISION

In *Kerns v. Apfel*,⁶⁹ the Eighth Circuit acknowledged that consideration of what constitutes "highly marketable" skills is an endeavor undertaken without the benefit of guidance from the regulations.⁷⁰ The court also recognized that the statute and regulations contain specific language informing claimants that a disability is defined in terms of the ability to *perform* work, not in terms of difficulties the claimants might experience in *obtaining* work.⁷¹

However, the court found that the regulations support the proposition that age is directly related to the probability of obtaining employment.⁷² The court also looked to the structure of the regulations to determine that "highly marketable" skills are not the same as transferable skills.⁷³ Finally, the court

64. 149 F.3d 893 (8th Cir. 1998) (Heaney J., dissenting).

65. *Id.*

66. *Id.* at 896 (citing 20 C.F.R. § 404.1563(d) (1998)).

67. *See* Varley v. Secretary of Health & Human Servs., 820 F.2d 777, 780-81 (6th Cir. 1987) (holding that "the claimant's age as of the time of the decision governs in applying the regulations. . . . The fact that a claimant who is unable to engage in such activity at the time of the decision may have been able to do so at some point in the past goes to the question of the onset date, not the question of disability.").

68. 160 F.3d 464, 467 (8th Cir. 1998) ("Consideration of the term 'highly marketable' is an issue of first impression in this court.").

69. *Id.*

70. *Id.* ("Our task is made more difficult by the lack of any express definition of the term in the regulations.").

71. *Id.* at 467-68 (citing 42 U.S.C. § 423(d)(2)(A)(1994); 20 C.F.R. § 404.1566(c) (1998); 20 C.F.R. § 404.1563(a) (1998)). This regulation reads in pertinent part: "We will determine that you are not disabled if your residual functional capacity and vocational abilities make it possible for you to do work which exists in the national economy, but you remain unemployed because of—(1) your inability to get work." 20 C.F.R. § 404.1566(c) (1998) (emphasis added).

72. *Id.* at 468.

73. *Id.*

aligned itself with the precedent set by other circuits that have reached a judicial definition of the term "highly marketable" skills.⁷⁴ The court stated that "it appears overwhelmingly evident to other courts passing upon the issue, and to this court, that the regulations require something more than a mere determination of transferability for claimants approaching retirement age."⁷⁵

In reaching its definition of "highly marketable" skills, the court quoted another subsection of the regulation at issue, which explicitly states that age, as a vocational factor, denotes calendar years as well as a claimant's ability to "adapt to a new work situation and *to do work* in competition with others."⁷⁶ The regulation also states that "this section recognizes a direct relationship between age and *the likelihood* of employment,"⁷⁷ but then contains further language concerning an older claimant's ability to adapt and compete.⁷⁸

V. COMMENT

In *Varley v. Secretary of Health & Human Services*,⁷⁹ the Sixth Circuit asserted that the regulations provide "a straightforward command" that, claimants over age sixty shall be found to have transferable skills if their skills are "highly marketable."⁸⁰ According to the court, it is "intuitively reasonable" that the regulations should not be read otherwise.⁸¹ The Seventh Circuit has also been reluctant to recognize the possibility of any ambiguity in the language of the regulations and has stated that "[t]he language is unmistakably clear."⁸²

In a decision published four months after the regulations were amended to include the regulation at issue, the United States District Court for the Eastern District of Michigan opined that the regulation "appears to interpret" the regulation directing that, for claimants between sixty and sixty-four years old, transferability of skills should be evaluated in terms of "vocational adjustment required in terms of tools, work processes, work settings, or the industry."⁸³ As is apparent, the regulation does not address the relevance of a claimant's ability

74. *Id.* at 468-69 (quoting *Emory v. Sullivan*, 936 F.2d 1092, 1094 (10th Cir. 1991); *Pineault v. Secretary of Health & Human Servs.*, 848 F.2d 9, 11 (1st Cir. 1988); *Renner v. Heckler*, 786 F.2d 1421, 1424-25 (9th Cir. 1986); *Tom v. Heckler*, 779 F.2d 1250, 1257 n.11 (7th Cir. 1985)).

75. *Id.* at 469 (citing 20 C.F.R. § 404.1563(d) (1998)).

76. *Id.* at 468 (quoting 20 C.F.R. § 404.1563(a) (1998) (emphasis added)).

77. *Id.* (quoting *Preslar v. Secretary of Health & Human Servs.*, 14 F.3d 1107, 1111 (6th cir. 1994) (emphasis added)).

78. *Id.*

79. 820 F.2d 777 (6th Cir. 1987).

80. *Id.* at 781-82.

81. *Id.* at 782.

82. *Tom v. Heckler*, 779 F.2d 1250, 1256 (7th Cir. 1985).

83. *Blake v. Secretary of Health & Human Servs.*, 528 F. Supp. 881, 887 n.15 (E.D. Mich. 1981) (quoting 20 C.F.R. subpt. P, app. 2 (1981)).

to obtain employment, but rather her ability to adjust to a new work environment.

In *Kerns v. Apfel*,⁸⁴ the Eighth Circuit fell in step with the other circuits interpreting the “highly marketable” skills standard in the new regulation. This decision should provide some degree of assurance to Social Security benefits claimants over age sixty that they will more likely be found “disabled” than their younger co-workers unless their skills are “highly marketable.” The fact that there is no explicit statutory mandate for this decision is apparent. Nonetheless, it is equally apparent that the circuits are intent on maintaining this interpretation of the regulation.

Given that Congress has explicitly provided that age as a vocational factor is to be considered in terms of its affect on a Social Security benefits claimant’s ability to perform rather than obtain work,⁸⁵ and that the regulation also is specific about the relevance of age as it affects a person’s ability to do work,⁸⁶ courts arguably are not applying the law as it was written, but rather as they think it should be written. The Social Security Act does include age as a factor to be considered in determining whether an individual has a disability in so far as age affects one’s ability to “engage” in work.⁸⁷ However, whether an individual would be hired, or whether a job for which her skills qualify her exists in the economy, are not matters to be considered in the determination of the existence of a disability. Therefore, to “engage” in work, as contemplated by Congress, is not the same thing as to obtain work.

It appears that the courts are protecting a class of workers from employment discrimination. What is not clear is whether there exists a statutory or regulatory basis for doing so. It is important to recognize that Social Security benefits are

84. 160 F.3d 464 (8th Cir. 1998).

85. See *Tom*, 779 F.2d at 1257 n.11 (7th Cir. 1985) (Posner, J., dissenting) (recognizing that “the statutory definition of disability specifically provides that vocational factors must be viewed in terms of their effect on the ability to perform jobs rather than the ability to obtain them”). The statute provides:

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 423 (d)(2)(A) (1994) (emphasis added).

86. 20 C.F.R. § 404.1563(a) (1999). The regulation states: “‘Age’ refers to how old you are (your chronological age) and the extent to which your age affects your ability to adapt to a new work situation and to do work in competition with others.” 20 C.F.R. § 404.1563(a) (1999).

87. 42 U.S.C. § 423(d)(2)(A) (1994); see *supra* note 3 (quoting relevant statutory text).

not necessarily an unlimited resource.⁸⁸ Of course there is a strong public policy favoring judicial protection against employment discrimination, even a species of discrimination so subtle as to consist of an atmosphere in which it is merely "more difficult" for an older worker to obtain employment than a younger worker.⁸⁹ But the protection of Social Security funds from unnecessary expenditure also merits judicial attention.

VI. CONCLUSION

It seems "intuitively reasonable" that older job applicants will be at a disadvantage relative to younger ones competing for the same job. This would appear a practical reality in much the same way that it is "intuitively reasonable" to believe that many factors may induce an employer to reject job applicants based on some characteristic other than aptitude. For example, a black, Jewish, or female job applicant may face rejection on grounds of skin color, religion, or gender. This is a distasteful and intolerable realization.

However, such a realistic recognition does not necessarily lead to the conclusion that skin color, religion, and gender should be factors in determining the vocational adjustment question, as required under the regulations, of claimants for Social Security Disability benefits. Arguably, what the circuits have done in applying the "highly marketable" skills standard in particular cases is socially and intuitively desirable. But the underlying question remains: In the face of specific contrary language in the statute and regulations, is a claimant's ability to obtain employment a legally appropriate inquiry?

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88. See Forman, *supra* note 5, at 289 ("Social Security is in financial trouble largely because people are living longer and retiring at an earlier age. While there is a growing number of Social Security beneficiaries, there are relatively fewer workers to support them."); Dauster, *supra* note 30, at 462 ("[B]eginning in 2019, the Social Security Trust Fund will stop running surpluses. Social Security's reserves, its accumulated surpluses, will then begin to decline as the fund begins to pay out more than it brings in . . .").

89. Of interest in this regard is that none of the circuits discussed tangible evidence tending to show that the elderly do indeed experience more difficulty finding employment than their younger competition. There seems to be some acknowledged but unexamined sociological assumption operating behind the courts' reasoning. For example, the Sixth Circuit maintains that it is "intuitively reasonable" that older workers are at a competitive disadvantage. *Varley v. Secretary of Health & Human Servs.*, 820 F.2d 777, 782 (6th Cir 1987). It is not obvious that the court's "intuition" is a proper source of evidence in review of an administrative decision.

